SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 462

MRS. JOHN FAIN, and
C. W. DUNCAN, Administrator of the Estate of
Mrs. T. H. Duncan, Deceased,
Petitioners,

v.

W. RAY DUNCAN,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Without re-arguing any point or authority covered in the original petition, the petitioners pray leave of the Court to offer the following brief comments in clarification of points and authorities presented by the Respondent:

I

The Respondent's Brief in Opposition says:

"The Court of Appeals, after a careful review of the facts, found that the District Court had abused its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence." [p. 4]

What the Court of Appeals said was:

"Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence." [Appendix to Petition, p. 23; 377 F. 2d at 55.]

The negative form of the Court's statement cannot be dismissed as mere semantics where the principal question relates to burden of proof, and the rule previously stated in the Court of Appeals opinion as controlling on the trial judge was that "the jury's verdict should be accepted if it is one which could reasonably have been reached." [Appendix, p. 18; 377 F. 2d at 52.]

II

The Respondent then states:

"The petition for certiorari does not question this evaluation of the District Court's action by the Court of Appeals." [p. 4]

On the contrary, the petition for certiorari directly challenges the evaluation by the Court of Appeals:

> "If the facts would have justified a directed verdict for the plaintiffs upon the same claim in a state court, how could it be an abuse of the trial judge's discretion to grant the plaintiffs the lesser relief of a new trial after a verdict for the defendant?" [Petition, p. 11.]

III

The Respondent says:

> "Judge Medina in *Dagnello* [v. *Long Island Rail Road Co.*, 289 F.2d 797], *supra*, further points out the flaw in petitioners' historical argument. It was not the rule at common law in 1791 that the opinion of a single judge sitting *nisi prius* was conclusive on motion for new trial. Motions for new trial were not addressed to the trial judge but were made at Westminister. They were heard *en banc* by four of the judges, and the trial judge in a particular case might or might not be one of the four." [p. 6.]

Neither in Judge Medina's opinion nor in the last two sentences of the above statement from the Respondent's brief is there anything contrary to Blackstone's statement as quoted in the Petition [pp. 6-7] from 3 *Blackstone, Commentaries on the Laws of England* *388 (1779).

IV

The Respondent says:

> "In the instant case it was the respondent who had no recollection of the accident (150a)." [p. 7.]

The Respondent's record citation [150a] is from the defendant's testimony on the *second* trial, which resulted

in a jury verdict for the petitioners. If it is competent to refer to the second trial testimony in this review of the first trial, the petitioners would like to do so also, particularly for the purpose of showing the soundness of the presumptions that should have arisen on the first trial from the petitioners' *prima facie* case and from the defendant's failure to testify.

V

The Respondent says:

"Under Tennessee law, the *res ipsa loquitur* doctrine is inapplicable where there is pleading and proof of specific acts of negligence. *Schindler v. Southern Coach Lines, Inc.*, 188 Tenn. 169 [1949]." [p. 7.]

Thirteen years after the *Schindler* case, the Supreme Court of Tennessee said:

"While there is a conflict of authorities, many well-considered decisions hold that in a case where the maxim *res ipsa loquitur* is applicable, a plaintiff does not lose the benefit of it by alleging specific acts of negligence which he fails to prove. Such is the rule in this State. *Nashville Interurban Ry. Co. v. Gregory*, 137 Tenn. 422, 433, 193 S.W. 1053."

Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 662 (1962)

Respectfully submitted,

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